UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

MORRIS PERHAM,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 03-240-P-S***
	)	
JO ANNE B. BARNHART,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Supplemental Security Income ("SSI") appeal raises the issue whether substantial evidence supports the commissioner's determination that the plaintiff, who alleges that he is disabled as a result of carpal tunnel syndrome, overuse tendonitis and post-traumatic stress disorder, is capable of making a successful vocational adjustment to work existing in significant numbers in the national economy. I recommend that the decision of the commissioner be vacated and the case remanded for further proceedings.

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[1] This action is properly brought under 42 U.S.C. § 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on June 21, 2004, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

Pursuant to the commissioner's sequential evaluation process, 20 C.F.R. § 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff retained the residual functional capacity ("RFC") to lift up to fifty pounds occasionally and up to twenty-five pounds frequently, needed to avoid constant use of the upper extremities and hands and had a mildly decreased ability to complete activities of daily living, maintain social functioning or sustain attention and concentration, Finding 6, Record at 25; that transferability of skills was not an issue in this case, Finding 10, *id*. at 26; that although the plaintiff was unable to perform the full range of medium work, he was capable of performing a significant number of jobs in the national economy, including surveillance-system monitor (Dictionary of Occupational Titles § 379.367-010 (U.S. Dep't of Labor, 4th ed. rev. 1991) ("DOT"), parking-lot attendant (DOT § 915.473-010) and dispatcher (DOT § 372.167-010), Finding 12, *id*.; and that he therefore was not under a disability at any time through the date of decision, Finding 13, *id*. The Appeals Council declined to review the decision, *id*. at 6-8, making it the final determination of the commissioner, 20 C.F.R. § 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales,* 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge reached Step 5 of the sequential process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than his past relevant

work. 20 C.F.R. § 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

The plaintiff contends that the administrative law judge erred in (i) failing to find him limited to occasional upper-extremity use, (ii) omitting any limitation on reading ability, (iii) relying on jobs that the plaintiff's limitations preclude him from doing and (iv) mishandling the opinion of a treating source, Richard C. Flaherty, M.D. *See generally* Itemized Statement of Errors Pursuant to Local Rule 16.3 Submitted by Plaintiff ("Statement of Errors") (Docket No. 5). I agree.

I. Discussion

A. Upper-Extremity Limitations

At the plaintiff's hearing on January 16, 2002, the administrative law judge crafted a hypothetical question for vocational expert Yvonne Batson based, *inter alia*, on "someone who would be limited in terms of being able to use the hands and the arms for repetitive use," excluding "jobs where both gross and fine manipulation on more than an occasional [sic] during the day." Record at 47. Batson sought clarification on the hand and arm limitations. *See id*. The administrative law judge responded: "[C]ertainly we're going to eliminate repetitive, we're going to eliminate the jobs where they would be used on a regular basis more than just occasionally during the day. . . . Looking more specific [sic] for jobs where the arms and hands would be used occasionally or even less than that if necessary." *Id*. Batson then testified that a

person with such limitations could perform the jobs of surveillance-systems monitor, parking-lot attendant and dispatcher. *See id*. at 47-48.[2]

In a February 14, 2002 letter to the administrative law judge, the plaintiff's counsel argued that a person with the stated upper-extremity limitations could not perform either the dispatcher or parking-lot jobs, both of which are described in the DOT as requiring "frequent" reaching, handling and fingering. *See id*. at 141-44, 147-48. Ultimately, by decision dated May 30, 2002, the administrative law judge found that the plaintiff needed only to avoid "constant" use of his upper extremities – in other words, that he was capable of "frequent" use. *See* Finding 6, *id*. at 25. The plaintiff complains that the revised upper-extremity finding is unsupported by substantial evidence of record, *see* Statement of Errors at 2-4, and I concur.

My analysis hinges on a subtle but significant semantic point. The plaintiff's treating physician, Dr. Flaherty, recommended on September 26, 2000 that the plaintiff avoid overuse of his upper extremities, including "repetitive hand motions[.]" Record at 174. In similar vein, a consulting examiner, Betsy D. Buehrer, D.O., concluded in a report dated April 3, 2001 that the plaintiff "should avoid repetitive or sustained wrist flexion or extension." *Id*. at 181. However, the DOT does not speak in terms of "repetitive" use of upper extremities; instead, it addresses whether the need to reach, handle and finger is "not present," "occasionally" present (that is, occurring up to a third of the time), "frequently" present (that is, occurring from one-third to two-thirds of the time) or "constantly" present (that is, occurring two-thirds or more of the time). *See, e.g., id*. at 144, 151; DOT §§ 001.061-010, 001.261-010.

Indeed, my research indicates that the word "repetitive" (in the context of upper-extremity use) has no universally acknowledged and understood analogue in the vocabulary of the DOT. *See, e.g., Gulo v.*

[2] Batson also testified that a person with the hypothetical limitations could work as a greeter, *see* Record at 48-49; *(continued on next page)*

Barnhart, 82 Soc. Sec. Rep. Serv. 495, 505-07 & n.7 (N.D. Ill. 2002) (finding reversible error in administrative law judge's failure to articulate how plaintiff incapable of repetitive fingering could perform frequent but not constant fingering); *Abbott v. Massanari*, 77 Soc. Sec. Rep. Serv. 665, 674-76 (D. Neb. 2002) (finding reversible error in administrative law judge's failure to clarify with medical source whether ban on repetitive gripping and grasping permitted frequent use of hands for those activities).

At hearing, the administrative law judge construed the repetitive-motion limitation to preclude the plaintiff from performing more than "occasional" upper-extremity work. *See* Record at 47. He was free to change his mind provided that his decision ultimately was supported by substantial evidence, but it was not.

The administrative law judge described his final RFC assessment, precluding "constant use of the upper extremities and hands," as "consistent with Dr. Flaherty's statement in September 2000 at which time he limited the claimant only from heavy lifting, forceful hand use and repetitive hand motions." Record at 23 (citation omitted). However, as the plaintiff points out, *see* Statement of Errors at 3, Dr. Flaherty made reasonably clear in a January 31, 2002 progress note and RFC assessment (which the administrative law judge was provided, *see* Record at 23) that he equated the words "repetitive" and "frequent" – in other words, that the plaintiff was not capable of "frequent" use of his upper extremities, *see id.* at 222-26. Properly understood, Dr. Flaherty's opinion undercuts, rather than supports, the administrative law judge's upper-extremity finding.

Nor is the finding of Dr. Buehrer of much help to the commissioner. Inasmuch as appears, Dr. Buehrer was not asked to clarify her opinion, and there is no basis on which one reasonably can assume that she would or would not have found the plaintiff's limitations consistent with "frequent" use of his upper

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however, in a post-hearing letter to the administrative law judge the plaintiff's counsel took issue with that assessment, *(continued on next page)*

extremities. Lawrence P. Johnson, M.D., a Disability Determination Services ("DDS") non-examining consultant, did indicate in a June 13, 2001 RFC assessment that the plaintiff was precluded from "constant repetitive use of the hands" – a conclusion he described as not differing significantly from treating-source opinions on file. *Id*. at 202, 205. Nonetheless, Dr. Johnson did not have the benefit of the January 2002 clarification by Dr. Flaherty, undercutting the weight that properly can be given to his opinion. *See, e.g.*, *Rose v. Shalala*, 34 F.3d 13, 18 (1st Cir. 1994) ("[T]he amount of weight that can properly be given the conclusions of non-testifying, non-examining physicians will vary with the circumstances, including the nature of the illness and the information provided the expert.") (citations and internal quotation marks omitted).[3]

The administrative law judge's finding that the plaintiff was capable of frequent use of his upper extremities is thus unsupported by substantial evidence of record.

B. Reading Ability

The plaintiff next complains that the administrative law judge erred in failing to find a limitation on his reading ability. *See* Statement of Errors at 4-5. In essence, the plaintiff again complains that the administrative law judge got it right the first time (at hearing), but changed his mind after receiving the plaintiff's counsel's post-hearing letter. *See id*. At hearing, the administrative law judge asked Batson to assume that his hypothetical worker had a "limited education, basic understanding in terms of being able to read basic information or safety signs, or information that would be necessary actually on the job from a hazardous point of view[.]" Record at 46. In his post-hearing letter, the plaintiff's counsel argued that an individual with such a limitation would not be able to perform the surveillance-system-monitor job. *See id*.

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see id. at 153-54, and the administrative law judge did not rely on the greeter job, *see* Finding 12, *id*. at 26.

[3] At oral argument, counsel for the commissioner relied on a May 1, 2001 RFC evaluation by Beth Benner, "SDM," *see* Record at 189, in addition to the reports of Drs. Buehrer and Johnson. Inasmuch as appears, Benner, a "Single Decision Maker," *see id*. at 56, is not a medical source. In any event, her report, like that of Dr. Johnson, predated Dr. Flaherty's

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at 141-42.[4] The administrative law judge subsequently found that the plaintiff had a "limited education" but made no mention of any reading or writing difficulty. *See* Finding 9, *id*. at 25.

This omission was error. Social Security regulations provide, in relevant part:

> (b) *How we evaluate your education*. The importance of your educational background may depend upon how much time has passed between the completion of your formal education and the beginning of your physical or mental impairment(s) and by what you have done with your education in a work or other setting. Formal education that you completed many years before your impairment began, or unused skills and knowledge that were a part of your formal education, may no longer be useful or meaningful in terms of your ability to work. Therefore, the numerical grade level that you completed in school may not represent your actual educational abilities. These may be higher or lower. However, if there is no other evidence to contradict it, we will use your numerical grade level to determine your educational abilities. The term *education* also includes how well you are able to communicate in English since this ability is often acquired or improved by education. In evaluating your educational level, we use the following categories:
>
> (1) *Illiteracy*. Illiteracy means the inability to read or write. We consider someone illiterate if the person cannot read or write a simple message such as instructions or inventory lists even though the person can sign his or her name. Generally, an illiterate person has had little or no formal schooling.
>
> (2) *Marginal education*. Marginal education means ability in reasoning, arithmetic, and language skills which are needed to do simple, unskilled types of jobs. We generally consider that formal schooling at a 6th grade level or less is a marginal education.
>
> (3) *Limited education*. Limited education means ability in reasoning, arithmetic, and language skills, but not enough to allow a person with these educational qualifications to do most of the more complex job duties needed in semi-skilled or skilled jobs. We generally consider that a 7th grade through the 11th grade level of formal education is a limited education.

20 C.F.R. § 416.964(b) (emphasis in original).

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clarification.

[4] In his post-hearing letter, the plaintiff's counsel also argued that the plaintiff's reading limitation precluded performance of the parking-lot-attendant job, *see* Record at 141-42; however, he clarifies in his Statement of Errors that this was error and that he should have referenced the dispatcher job, *see* Statement of Errors at 4 n*.

The plaintiff completed seventh grade. *See* Record at 220-21. Thus, he properly could be categorized as having a "limited education" and presumed to have commensurate reading and writing skills absent evidence to the contrary. 20 C.F.R. § 416.964(b); *see also, e.g., Walston v. Sullivan*, 956 F.2d 768, 771 (8th Cir. 1992) ("A claimant's formal education is conclusive proof of his educational abilities under the regulations only if no other evidence is presented to contradict it. The record contains substantial evidence which contradicts the ALJ's finding that Walston's education was limited rather than marginal.") (citation omitted); *Albritton v. Sullivan*, 889 F.2d 640, 643 (5th Cir. 1989) ("Albritton's formal schooling was no longer meaningful and did not represent his educational abilities in the face of uncontradicted evidence that he was functionally illiterate. The record otherwise lacks substantial evidence to support a finding of literacy.") (citation and footnote omitted).

The plaintiff testified at hearing that he could read basic words but did not read much and could not read a newspaper very well. *See* Record at 39-40. He adduced no recent evidence to corroborate his claim but did produce educational records showing that after repeating kindergarten, he was referred in second grade for evaluation of his low academic achievement, including low reading skills. *See id*. at 216-18. Although he was found to have average intellectual functioning, his evaluator expected him to have "difficulty with independent assignments particularly when difficult reading material or an auditory stimulus is presented and a motor response is required." *Id*. at 217. Inasmuch as appears, the administrative law judge rejected the claimed reading difficulties on the basis that the plaintiff left school because of family problems, was found to have average intellectual functioning when tested in second grade and produced no other records of assessment for academic or learning difficulties. *See id*. at 22.

Nonetheless, the plaintiff adduced sufficient evidence to rebut the presumption that his reading skills were commensurate with a "limited education" in the form of his own testimony and his grade-school

materials.[5] None of the facts relied on by the administrative law judge – the plaintiff's non-academic reason for leaving school, his average intelligence and his lack of contemporaneous evidence – constitutes substantial, positive evidence that he can in fact read at a "limited" (as opposed to a "marginal") level. The administrative law judge thus erred in presuming the plaintiff capable of reading at the "limited" level.

C. Viability of Three Cited Jobs

In his third point of error, the plaintiff builds on his first two points to argue that all three jobs on which the administrative law judge relied were precluded by his RFC as he contends it should have been found. *See* Statement of Errors at 5-6. He is again correct. As discussed above, the Record does not support a finding that the plaintiff was able to use his upper extremities "frequently," as is required to perform the parking-lot-attendant and dispatcher jobs. *See* Record at 143-44, 147-48. Nor is there substantial, positive evidence that he possessed the requisite reading ability to perform the surveillance-system-monitor and dispatcher jobs, both of which have a language-development level of three (*i.e.*, a "GED," or General Educational Development, level of "L3"), entailing ability to "[r]ead a variety of novels, magazines, atlases, and encyclopedias" and "[r]ead safety rules, instructions in the use and maintenance of shop tools and equipment, and methods and procedures in mechanical drawing and layout work." *See id.* at 147, 150; Appendix C, § III to DOT.[6]

[5] In addition, there is no indication that the plaintiff was required to read in any of his previous jobs. *See* Record at 112-19.

[6] Indeed, as the plaintiff suggested in his Statement of Errors, *see* Statement of Errors at 6, and counsel for the commissioner conceded at oral argument, even assuming *arguendo* that the administrative law judge correctly found that the plaintiff's reading skills were commensurate with a "limited education," the Record still would not support a finding that he could perform the dispatcher job inasmuch as (i) an individual with a "limited education" cannot perform most skilled or semi-skilled work, *see* 20 C.F.R. § 416.964(b)(3), (ii) the dispatcher job has an "SVP," or Specific Vocational Preparation, level of six, requiring more than one year (and up to two years) of specific vocational preparation, *see* Record at 147, 155, (iii) by contrast, "unskilled" work corresponds with an SVP level of one or two, *see* Social Security Ruling 00-4p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2003) ("SSR 00-4p"), at 245, and is defined as work that usually can be learned in thirty days, *see* 20 C.F.R. § 416.968(a), and (iv) no finding was made that the
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The administrative law judge's finding that the plaintiff was able to perform the three cited jobs thus was not supported by substantial evidence of record.

plaintiff possessed transferable skills, *see* Finding 10, Record at 26, which enable an individual to perform semi-skilled and skilled work, *see* 20 C.F.R. § 416.968(d)(1).

D. Treatment of Treating Physician

The plaintiff's first three points of error, collectively, entitle him to reversal and remand of his case. Nonetheless, for the benefit of the parties, I address his fourth contention: that the administrative law judge failed to give proper weight to Dr. Flaherty's opinions that the plaintiff (i) was limited to occasional upper-extremity use, (ii) could not work a forty-hour week on a sustained basis and (iii) was limited to lifting and carrying twenty pounds. *See* Statement of Errors at 6-8.

The opinions in question address RFC and disability – issues reserved to the commissioner, as a result of which no "special significance" is accorded an opinion even from a treating source. *See* 20 C.F.R. § 416.927(e)(1)-(3). Nonetheless, regardless of the subject matter as to which a treating physician's opinion is offered, the commissioner must "always give good reasons in [her] notice of determination or decision for the weight [she] give[s] your treating source's opinion." *Id*. § 416.927(d)(2); *see also, e.g.*, Social Security Ruling 96-8p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2003) ("SSR 96-8p"), at 150 ("The RFC assessment must always consider and address medical source opinions. If the RFC assessment conflicts with an opinion from a medical source, the adjudicator must explain why the opinion was not adopted.").

As discussed above, the administrative law judge committed error when he misunderstood Dr. Flaherty's opinion regarding the plaintiff's upper-extremity limitations. He made a similar mistake in rejecting Dr. Flaherty's twenty-pound lifting limitation on the ground of unexplained inconsistency with an earlier "heavy lifting" limitation. *See* Record at 23. In fact, Dr. Flaherty's 2002 RFC assessment resolved the seeming inconsistency, making reasonably clear that Dr. Flaherty regarded the twenty-pound restriction as tantamount to a restriction against "heavy lifting." *See id*. at 223-26. Thus, no "good reasons" were given for rejection of the twenty-pound limitation.

By contrast, the administrative law judge did provide "good reasons" for rejecting the full-workweek opinion. As he observed, *see id*. at 23, no such opinion was reflected in Dr. Flaherty's earlier notes, *see id*. at 174, and Dr. Flaherty provided no explanation for the seeming change of heart, *see id*. at 222-26. The plaintiff contends that, at the least, the administrative law judge was obliged to recontact Dr. Flaherty to ascertain the basis for the workweek opinion. *See* Statement of Errors at 7; *see also, e.g.*, Social Security Ruling 96-5p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2003) ("SSR 96-5p"), at 127 ("Because treating source evidence (including opinion evidence) is important, if the evidence does not support a treating source's opinion on any issue reserved to the Commissioner and the adjudicator cannot ascertain the basis of the opinion from the case record, the adjudicator must make 'every reasonable effort' to recontact the source for clarification of the reasons for the opinion."). I am unpersuaded. The basis of the opinion (symptoms of overuse tendonitis) is ascertainable from the Record. *See* Record at 222, 226.

II. Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **VACATED** and the case **REMANDED** for further proceedings not inconsistent herewith.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 24th day of June, 2004.

/s/ David M. Cohen

David M. Cohen
United States Magistrate Judge

Plaintiff

MORRIS PERHAM

represented by **DANIEL W. EMERY**
36 YARMOUTH CROSSING DR
P.O. BOX 670
YARMOUTH, ME 04096
(207) 846-0989
Email: danemery@maine.rr.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

COMMISSIONER OF SOCIAL SECURITY

represented by **KAREN BURZYCKI**
ASSISTANT REGIONAL COUNSEL
OFFICE OF THE CHIEF COUNSEL, REGION 1
Room 625 J.F.K. FEDERAL BUILDING
BOSTON, MA 02203
617/565-4277
Email: karen.burzycki@ssa.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

ESKUNDER BOYD
SOCIAL SECURITY ADMINISTRATION
OFFICE OF GENERAL COUNSEL, REGION I
625 J.F.K. FEDERAL BUILDING
BOSTON, MA 02203
617/565-4277
Email: eskunder.boyd@ssa.gov
ATTORNEY TO BE NOTICED

HUNG TRAN
SOCIAL SECURITY ADMINISTRATION
OFFICE OF GENERAL COUNSEL, REGION I
625 J.F.K. FEDERAL BUILDING
BOSTON, MA 02203
(617)565-4277
Email: hung.t.tran@ssa.gov
TERMINATED: 02/23/2004
ATTORNEY TO BE NOTICED